

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

AMANDA A. NECE,

Defendant and Appellant.

A105954

(Mendocino County
Super. Ct. No. 03-57553-02)

Introduction

Defendant Amanda April Nece appeals the trial court's sentencing determination following her plea of guilty to eight of ten counts of burglary, two of four grand theft counts, and one of two counts for possessing a forged driver's license. She contends that the trial court's imposition of consecutive terms violates the constitutional prohibition of *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*). Alternatively, she contends the trial court committed reversible error in failing to state its reasons for sentencing her to consecutive, rather than concurrent, terms. We shall conclude that *Blakely* does not apply to the imposition of consecutive sentences and that defendant has waived any claim of error in the purported failure of the court to state reasons for its imposition of consecutive sentences.

Facts and Procedural Background

The facts of the crimes are essentially undisputed and involve the theft of blank checks, and the forging, manufacturing and cashing of counterfeit checks. As stated by the prosecutor, and agreed to by defendant, the factual basis for the pleas was: "What

occurred here was a course of conduct by which using the name of three different individuals, . . . and using either stolen or forged identity documents for those persons, [co-defendant] Samuel Gregory and Amanda Nece passed counterfeit checks that were purported to be on the accounts of the Hopland Public Utilities District and Martino Construction, and they passed these checks which were either fake payroll checks or checks for the purchase of goods, and they did this at [various stores]. Specifically, pursuant to her guilty pleas, defendant admitted she burglarized seven different Ukiah stores in October 2003. These included Mervyns (count two), WalMart (count five), Friedman Brothers (count eight), Radio Shack (count eleven), J.C. Penney (count fifteen), and Staples (count eighteen) on October 20, 2003. She admitted burglarizing Staples previously on October 8, 2003 (count twenty-two) and Rite Aid on October 7, 2003 (count thirty-three). She further admitted committing grand theft against Albertson's twice on October 17, 2003 (counts twenty-eight and thirty-two). Finally, she also admitted that during the month of October 2003, she possessed a forged driver's license (count sixty). Defendant agreed that the court could consider all charged counts for sentencing purposes pursuant to a *Harvey* waiver¹ and that the court could consider any uncharged acts for restitution purposes. In exchange, the prosecution moved to dismiss the remaining counts and a special allegation that she had committed the crimes while on bail. (Pen. Code, § 12022.1.²) At sentencing, the court selected one burglary count (count two) as the principal term, imposed the middle term of two years in prison, and imposed consecutive terms on each of the remaining ten counts pursuant to section 1170.1 for a total sentence of eight years eight months. The court also imposed a fine of \$1,600 (§ 1202.4, subd. (b)) with an additional \$1,600 fine suspended pending successful completion of parole. (§ 1202.45.) The court also ordered victim restitution.

Defendant filed a timely notice of appeal on March 23, 2004.

¹ *People v. Harvey* (1979) 25 Cal.3d 754.

² All statutory citations are to the Penal Code, unless otherwise indicated.

Discussion

I.

Defendant contends that the imposition of consecutive sentences under section 1170.1 violated her constitutional rights under *Blakely, supra*, ___ U.S. ___ [124 S.Ct. 2531]. *Blakely* makes clear that a jury must find any fact “ ‘that increases the penalty for a crime *beyond the prescribed statutory maximum.*’ ” (*Blakely, supra*, 124 S.Ct. at p. 2536, italics added.) The midterm is the prescribed statutory maximum under California’s determinate sentencing scheme. Therefore, a jury must determine facts to support the imposition of a greater term. Defendant argues that there is a similar statutory presumption that a concurrent, rather than consecutive, term will be imposed. Defendant bases this argument on section 669, which states in the last sentence of the second paragraph: “Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently.” This language cannot be read as creating a presumption that the concurrent term is the norm. In contrast to section 1170, subdivision (b), which states that “the court shall order imposition of the middle term,” section 669 operates only in the event the trial court does not specify whether a term should run consecutively or concurrently. This can hardly be said to create a statutory presumption that the court will sentence a defendant concurrently. Our conclusion is consistent with that reached by the court in *People v. Reeder* (1984) 152 Cal.App.3d 900, 923 [“there is no . . . statutory presumption in favor of concurrent rather than consecutive sentences”] Therefore, *Blakely* does not apply to the trial court’s imposition of consecutive sentences.

II.

In the alternative, defendant contends the court erred in failing to state its reasons for imposing consecutive prison terms. Section 1170, subdivision (c), states: “The court shall state the reasons for its sentence choice on the record at the time of sentencing.” The courts have held that a decision “to impose [a] consecutive sentence[] is . . . a ‘sentencing choice’ for which, under the determinate sentencing law, the trial court must

give reasons. [Citations.]” (*People v. Champion* (1995) 9 Cal.4th 879, 934, disapproved on another point in *People v. Ray* (1996) 13 Cal.4th 313, 369, fn. 2 (conc. opn. of George, C. J., joined by a majority of the court).)

Respondent contends that defendant forfeited her claim of error by failing to object to any insufficiency of the court’s statement of reasons. Respondent further argues that, pursuant to defendant’s *Harvey* waiver, the court could consider all charged acts for any proper sentencing purpose and that the court’s statement of its tentative thinking at the sentencing hearing constituted an adequate explanation of reasons for its decision to impose consecutive sentences. We agree that defendant’s failure to object to the asserted failure to adequately state reasons for imposing consecutive terms forecloses such argument on this appeal.

At sentencing, defense counsel argued that the court should “balance the factors in aggravation and mitigation,” imposing a term of five years eight months in prison. The court responded: “Well, I was going to give you at least an indicated, which I’m required to do, before I do the actual sentencing. And as I started to articulate earlier, I don’t think the aggravated is particularly appropriate in this case because of her somewhat minimal prior record, although she was on probation for exactly the same type of offense I believe in Nevada, was it? [¶] . . . [¶] But, she did enter an early plea. I would give her tremendous weight on that issue. And so it was my intention to impose the mid term as to count two. I was tentatively running everything else consecutive, but it’s subject to argument. I know the defense wanted me to consider running count two and count five and eight and I believe eleven concurrently because they happened on the same date. *But they were still separate transactions.*” (Italics added.)

Defense counsel admitted that “[t]here’s no doubt that a number of businesses were affected. There’s no doubt that there is a criminal sophistication under these circumstances.” Accordingly, defendant did not challenge the court’s authority to impose consecutive terms, but rather asked for “leniency because there were separate businesses. And under case law, if there’s a separate victim, the court has absolutely every right to run those consecutive.” The court imposed the middle term on count two, balancing

defendant's early plea against the finding that she "did occupy a position of leadership and [the] manner in which this crime is carried out indicates planning sophistication and professionalism. It also involved the actual taking of great monetary value. She was on probation at least in [the] DUI case out of the State of Nevada when this offense was committed. The defendant's prior performance on probation, therefore, was unsatisfactory. And it appears as well that the defendant was on bail in Sonoma County when she committed these offenses." The court then stated: "With respect to counts five, eight, eleven, fifteen, eighteen, [thirty]-three and twenty-two, the court finds that those were offenses that occurred against separate victims, although some of them occurred on the same date; therefore, she's to be sentenced to one-third the mid term of each of those, which is eight months. And the total on that is four years eight months, to run consecutive to the two years imposed as to count two. [¶] With respect to counts twenty-eight and thirty-two, she's to be sentenced to one-third the mid term of two years as to each of those counts, that totaling one year four months. And that likewise will run consecutive. [¶] With respect to count sixty, the court will impose one-third the mid term of two years, which is eight months. That likewise is to be eight months consecutive." The court then conducted a discussion in which defense counsel participated, regarding custody credits, restitution fines, and restitution orders. Before adjourning, the court asked if there was "[a]nything further?" Defendant never objected to the court's alleged failure to state further reasons for its decision to run the terms consecutively.

"[A] party in a criminal case may not challenge the trial court's discretionary sentencing choices on appeal if that party did not object at trial." (*People v. Gonzales* (2003) 31 Cal.4th 745, 748 (*Gonzales*); *People v. Scott* (1994) 9 Cal.4th 331, 356 (*Scott*).) In *Scott*, the California Supreme Court "prospectively announced a new rule: A party in a criminal case may not, on appeal, raise 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' if the party did not object to the sentence at trial. (*Scott, supra*, 9 Cal.4th at p. 353.) The rule applies to 'cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing

factor, misweighed the various factors, *or failed to state any reasons or give a sufficient number of valid reasons*’ (*ibid.*), but the rule does not apply when the sentence is legally unauthorized (*id.* at p. 354).” (*Gonzales, supra*, 31 Cal.4th at p. 751, italics added.)³

Counsel must have a “meaningful opportunity to object . . . [which] can occur only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the sentence the court intends to impose and the reasons that support any discretionary [sentencing] choices.” (*Scott, supra*, 9 Cal.4th at p. 356.) Clearly, the parties were so apprised here.

Defendant argues that any effort to object would have been “futile” and that she had no meaningful opportunity to object to the imposition of consecutive terms. We disagree. The court clearly indicated it was inclined toward imposing consecutive sentences and stated its belief in the tentative opinion that the transactions were separate. Indeed, this opportunity was *more* meaningful than that required by our Supreme Court, which in *Gonzales* rejected the assertion that a such a “meaningful opportunity” to object

³ As explained in *Gonzales, supra*, 31 Cal.4th 745: “*Scott* reasoned: ‘[C]ounsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court’s statement of reasons are easily prevented and corrected if called to the court’s attention.’ (*Scott, supra*, 9 Cal.4th at p. 353.) Such a requirement would ‘reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them.’ (*Ibid.*) *Scott* perceived no unfairness to the parties. It explained: ‘The parties have ample opportunity to influence the court’s sentencing choices under the determinate scheme. As a practical matter, both sides often know before the hearing what sentence is likely to be imposed and the reasons therefor. Such information is contained in the probation report, which is required in every felony case and generally provided to the court and parties before sentencing. [Citations.] In anticipation of the hearing, the defense may file, among other things, a statement in mitigation urging specific sentencing choices and challenging the information and recommendations contained in the probation report. [Citations.] Relevant argument and evidence also may be presented at sentencing. [Citations.] [A] defense attorney who fails to adequately understand the available sentencing alternatives, promote their proper application, or pursue the most advantageous disposition for his client may be found incompetent.’ (*Scott, supra*, 9 Cal.4th at pp. 350-351.)” (*Gonzales*, at p. 751, fn. omitted.)

could only be effectuated by the court's issuing a tentative opinion before the sentencing hearing. (*Gonzales, supra*, 31 Cal.4th at p. 751.)

After imposing sentences consecutively, the court gave defense counsel ample opportunity to object to the asserted failure to state reasons by asking whether there was “[a]nything further?” Although counsel argues that any objection would have been “futile” at that point, the asserted “futility” goes toward the court’s imposition of consecutive sentences, not toward its asserted failure to state reasons. Had defense counsel pointed this asserted failing to the court, we have little doubt the court would have immediately rectified any such error by more fully stating its reasons. The opportunity was there. Defendant did not take it. This issue is waived.

Disposition

The judgment is affirmed.

Kline, P.J.

We concur:

Haerle, J.

Lambden, J.